CHEOW SIONG CHIN

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[ORIGINATING SUMMONS NO. A83 OF 1985]
21 MAY 1986

CRIMINAL LAW AND PROCEDURE: *Detention - Restricted Residence Enactment - Orders under ss. 2(ii), 2A(i) - Application under s. 365 of Criminal Procedure Code for habeas corpus - Declarations and certiorari - Right to an inquiry before order made - Audi alteram partem - Whether detention outside scope of Enactment.*

STATUTORY INTERPRETATION: *Section 2(i), (ii) of Restricted Residence Enactment 1933 - Article 5 of the Constitution - To be read together.*

The plaintiff was arrested under an order made on 21 June 1984 by the Deputy Minister of Home Affairs under the Restricted Residence Enactment ("the Enactment"). On 27 August 1984 the Deputy Minister made another order under s. 2(ii) of the Enactment requiring the plaintiff to reside in the town of Gua Musang in Kelantan for a period of three years from the date of the order and also a further order under s. 2A(i) of the Enactment directing him to be placed under supervision for the same period.

On 28 September 1984, the plaintiff applied under s. 365 of the Criminal Procedure Code ("the Code") for a writ of *habeas corpus* challenging the orders made under the Enactment. This application was dismissed by the High Court after which the plaintiff instituted the present proceedings seeking declarations to the effect that he was entitled to an enquiry before the orders were made and that the grounds of his detention, that is, cheating the public, is not within the scope, ambit and purview of the Enactment.

Held:

[1] The Court held that s. 2 of the Enactment should be read together with Article 5 of the Constitution and in doing so, referred to the case of *Assa Singh v. Mentri Besar Johore* [1969] 2 MLJ 30.

[2] On the question of whether the plaintiff was entitled to an enquiry under the circumstances,

(a) on the face of the Enactment there is no provision for an enquiry

(b) the Constitution by Clause (1) and (3) of Article 5 clearly upholds the common law principle of *audi alteram partem*

(c) the absence of a specific provision for an enquiry under the Enactment does not mean that an enquiry should not be held because the Constitution must be read into the Enactment

(d) on a consideration of all the authorities, a person who has been detained under s. 2(i) of the Enactment is entitled to an enquiry before an order is made against him under s. 2(ii) of the Enactment.

[3] The grounds for restricted residence in the instant case are within the scope, ambit and purview of the Enactment.

[Order Accordingly. Costs to the plaintiff.]

Cases referred to:
Cheow Siong Chin v. Menteri Dalam Negeri Malaysia & Ors. [1985] CLJ (Rep) 59
Assa Singh v. Mentri Besar Johore [1969] 2 MLJ 30
Yeap Hock Seng v. Minister of Home Affairs, Malaysia [1975] 2 MLJ 279

Legislation referred to:
Criminal Procedure Code, s. 365
Federal Constitution, arts. 5, (3), (4), (1), 160
Restricted Residence Enactment (FMS Cap 39), ss. 2, (ii), 2A(i)

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendants - P. Mahalingam (Mohamed Rauff bin Nabi Box with him); SFC

JUDGMENT

Harun Hashim J:

The plaintiff was arrested under an order made on 21 June 1984 by the Deputy Minister of Home Affairs under the Restricted Residence Enactment (FMS Cap. 39) (the Enactment) and detained initially in police custody and then in prison. The grounds of his detention were that as a registered dealer in commodity trading he had in 1983 cheated the public by giving false promises and making false declarations as a result of which many investors sustained considerable financial loss.

Representations were made by and on his behalf against this order but to no avail and on 27 August 1984 the Deputy Minister made another order under s. 2(ii) of the Enactment requiring the plaintiff to reside in the Town of Gua Musang in Kelantan for a period of three years from the date of the order, and also a further order under s. 2A(i) of the Enactment directing him to be placed under police supervision for the same period. These two orders were served on the plaintiff at Pudu Prison, Kuala Lumpur on 3 September 1984 and he was then taken to Gua Musang.

On 28 September 1984, the plaintiff applied under s. 365 of the Criminal Procedure Code for a writ of *habeas corpus* challenging the orders made under the Enactment. On 26 October 1984 the High Court dismissed the application for *habeas corpus*. The plaintiff appealed. On 28 March 1985 the Supreme Court dismissed the appeal on the ground that the writ of *habeas corpus* is not available to the plaintiff in the circumstances of his case but observed that-

> On the basis of his claim that this case did not come within the scope, ambit or purview of the Enactment or that an enquiry should have been held before the orders were made, it would be open to him to seek relief by way of an order of *certiorari* or a declaration to this effect." *Cheow Siong Chin @ Chew Soon Cheng v. Menteri Dalam Negeri Malaysia & Ors*. [1985] CLJ (Rep) 59.

Hence the present application in which the plaintiff seeks declarations to the effect that

(a) He is entitled to an enquiry before the orders were made; and

(b) The grounds for restricted residence are not within the scope of the Enactment.

The Right to be Heard

The Deputy Minister (En. Mohd. Kassim bin Ahmad) in his affidavit stated that he issued the Order dated 21 June 1984

(1) After carefully scrutinising the written information and documents, I had reasonable grounds for believing that the plaintiff should be required to reside in a certain area, namely Gua Musang Town.

(2) After I was satisfied that it was not necessary to hold an inquiry under s. 2(i) of the said Enactment, I issued the said Order.

The Deputy Minister (En. Radzi Tan Sri Sheikh Ahmad) in his affidavit, stated that he issued the Order dated 27 August 1984

(1) After carefully scrutinising the relevant written information and documents, I was satisfied that it was not necessary to hold an inquiry under s. 2(ii) of the said Enactment.

(2) After being satisfied from the said information and documents that there were reasonable grounds for believing that the plaintiff should be required to reside in Gua Musang Town, I made the said Order.

It is common ground, therefore, that no inquiry was held before the two Orders were made.

Section 2 of the Enactment, *inter alia*, reads-

2(i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim or should be prohibited from entering into any particular district or districts or mukim or mukims the Minister may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he is already in prison, for the detention of that person.

(ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the Schedule that from a date to be stated in the order, the person do reside in such district or mukim as may be specified in the order or do not enter into such district or districts or mukim or mukims as may be so specified.

In *Assa Singh v. Mentri Besar Johore* [1969] 2 MLJ 30 (a Bench of five Judges) it was held by the Federal Court that the Enactment must be applied with such adaptations as may be necessary to bring it into accord with the Constitution and the provisions of Clause (3) and (4) of Article 5 of the Constitution must therefore be read into the provisions of the Enactment.

Article 5 of the Constitution provides-

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any Judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:

Provided that this Clause Shall not apply to the arrest or detention of any person under

the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka day.

(5) Clauses (3) and (4) do not apply to an enemy alien.

Their Lordships in *Assa Singh's* Case made the following observations on s. 2 of the Enactment and Article 5 of the Constitution:

Ong CJ at p. 36 said:

"As to an inquiry subsequent to detention, perhaps the matter has remained in abeyance merely because the motion herein was filed before any further steps could be taken to hold such enquiry. The learned Solicitor-General concedes, I believe, that the applicant is entitled to an inquiry at which he would have full opportunity of making representations.

Suffian FJ at p. 37 said:

"It is to be noted that this second order may be made after such further enquiry as the Minister may deem necessary. In other words, an enquiry after arrest is optional."

And at p. 40:

"But I see nothing in the article which gives him a right to an enquiry. All that Clause (3) of Article 5 says is that he shall be allowed to consult and be defended by a legal practitioner of his choice. To infer from this that he is entitled to an enquiry is as absurd as inferring from my right to defend myself with my fists that I am entitled to be attacked. Clause(1) of Article 5 merely states that no person shall be deprived of his personal liberty save in accordance with law. It does not say that no person shall be deprived of his personal liberty save after an enquiry. I yield to no one in my concern for the liberty of the subject, but if the makers of the Constitution had intended to alter the pre-Merdeka Law (which may authorise the detention of any person without giving him the right to an enquiry), they would have used explicit language.

Perhaps for practical purposes the learned Solicitor-General is right to concede that the applicant is entitled to an enquiry. After all, persons who are supposedly more dangerous to the community and are detained under any law against subversion or made in consequence of a proclamation of emergency are given the benefit of an enquiry: see the Internal Security Act No. 18 of 1960."

Gill FJ at p. 45 said: "The Enactment does not say that there should be an inquiry. But as any arrested person has a right to be given an opportunity to defend himself, to allow him such an opportunity and to consider what he or a Counsel of his choice says on his behalf in answer to the allegations in support of the order sought against him would be tantamount to holding an inquiry. The important thing is that he must not be condemned without being heard.

It is argued on behalf of the plaintiff on the authority of this case that the right to be heard should be read into the Enactment in order to give effect to Article 5 of the Constitution and to comply with the rules of natural justice that no person is to be condemned without being heard.

Assa Singh's Case was decided in March 1969. By Act A354, Clause (4) of Article 5 of the Constitution was amended on 27 August 1976 by the addition of the proviso to that clause. It will be seen that Clause (4) no longer applies to restricted residence cases (as here). That leaves Clause (1) and (3).

There are basically two steps in making orders regarding residence. The first step is **prior** to

arrest and detention. Although s. 2(i) of the Enactment provides for "after such enquiry as he may deem necessary", it cannot be seriously contended that the right to be heard should arise at this stage. Many arrests are made daily without the person arrested being heard first. The second step is the order of restricted residence made **after detention** under s. 2(ii) of the Enactment. There is provision for **further enquiry** but again this only arises if the Minister deems such enquiry necessary. It may well be (and it is reasonable to infer from the affidavit evidence of the two Deputy Minister) that the only information the Minister had in making the second order is the same information he had in making the first order. It is also probable that that information against the plaintiff was so overwhelming that it was not necessary to enquire further. There were, however, representations by the plaintiff and on his behalf which obviously did not impress the Minister. Is he entitled to an enquiry under these circumstances?

In *Assa Singh's* case the issue in the instant case had not actually arisen because the plaintiff there went to Court before the second order was made. Azmi LP and Raja Azlan Shah J did not deal with the issue. Ong CJ did not decide on the issue either. Suffian FJ came out quite strongly as a matter of law that the plaintiff is not entitled to an enquiry. Gill FJ on the other hand held that an enquiry was implied. All five Judges were, however, unanimous that the Enactment being a pre-Merdeka law must be applied to accord with the Constitution.

The Enactment was enacted in 1933 with very little change since. On its face there is no provision for an enquiry. The Constitution (by Clause (1) & (3) of Article 5) clearly upholds the common law principle of *audi alteram partem* (hear the other side). Meaning that both sides of a controversy should be heard before a decision is arrived at - that they who are to decide shall hear both sides, giving one an equal opportunity with the other of knowing what is urged against him and of making good his claim or defence. As far as I am aware, the Enactment must be the only law in the country without provision for an inquiry. The Prevention of Crime Act 1959 (for the control of criminals, members of secret societies and other undesirable persons) provides for an inquiry before an order of restricted residence is made. Even the Internal Security Act, 1960 provides for an inquiry before a person is detained. In my opinion, the absence of a specific provision for an enquiry under the Enactment does not mean that an enquiry should not be held. This is because the Constitution must be read into the Enactment. Clause (1) of Article 5 provides that no person shall be deprived of his personal liberty save in accordance with law. "Law" is defined in Article 160 of the Constitution to include "the common law in so far as it is in operation in the Federation". The right to be heard is a principle of common law. Further, Clause (3) of Article 5 of the Constitution will be meaningless if a person is given the constitutional right to be defended but deprived of the forum to exercise that right.

On a consideration of all the authorities, I hold that a person who has been detained under s. 2(i) is entitled to an enquiry before an order is made against him under s. 2(ii) of the Restricted Residence Enactment.

Scope of Enactment

Next it is urged on behalf of the plaintiff that the grounds of his detention, viz. cheating the public is not within the scope, ambit and purview of the Enactment. In *Yeap Hock Seng v. Minister of Home Affairs, Malaysia* [1975] 2 MLJ 279 it was held that the Court can examine the grounds disclosed by the Minister to see they are relevant to the object which the law prescribes. The problem here is that the object of the Enactment is not obvious - the preamble merely states

An Enactment to provide for the making and enforcement of orders regarding residence in and exclusion from certain areas.

The Enactment indeed gives drastic powers to the executive to exile any person to any part of the Federation. As Dato' Marshall put it in *Assa Singh's* case, it may be used to exile any person who wears a grey tie because the executive does not like him to wear a grey tie.

It was, however, argued that as the allegation against the plaintiff is that of cheating under the Penal Code, he should be prosecuted in the criminal Courts and therefore the Enactment should not be used against him. It is not for the Court to fathom the thoughts of the Minister. The Enactment does give him the power to restrict the plaintiff on the grounds stated because the ground stated is **reasonable**, that is to say, a cheat should not be allowed to cheat innocent people. It would not be a reasonable ground, if the Minister had stated that the order was made because the plaintiff wore a grey tie. I accordingly hold that the grounds for restricted residence in the instant case are within the scope, ambit and purview of the Enactment.

Before parting with the case, it would not be inappropriate to observe that with the enactment of the Prevention of Crime Act 1959 and the Internal Security Act 1960, perhaps the Restricted Residence Enactment has served and outlived its purpose, is archaic and redundant. The first two mentioned laws already cover a very wide variety of undesirable elements in the country that could be dealt with under either law without resorting to the Restricted Residence Enactment. If new categories of undesirables need be created, then the legislature must create them. It is said that ignorance of the law is no excuse. On the other hand the citizen must not be kept ignorant of the law either, in particular he has a right to know what are the offences he should not commit. The continued existence of the Restricted Residence Enactment in its present form will forever provide a source of surprise to the citizen because he will not know when he will be arrested and detained for doing something which has not been declared a wrong. That, however, is for Parliament to consider.

Costs to plaintiff.

Also found at [1986] 2 CLJ 18